IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY & VICE ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO. 27 OF 1999

Geetanjali Woollen Pvt. Ltd., .. Plaintiffs.

vs.

m.v. X-Press Annapurna

& Ors. .. Defendants.

Mr. Pradeep Sancheti with P.S. Gidwani
S. Deshmukh and Ms. Bhatia
for plaintiffs.

Mr. S.K. Shah with N. Lal and Ms. N.S. Sumnani
i/by Bhatt and Saldhana for
Defendant Nos. 1 and 4.

Mr. G. Desai with M.V. Thakkar i/by Bootwala
& Co. for Defendant No. 2.

Mr. R.S. Jaisinghani with Ms. R. Tanna
i/by S.K. Legal Assoc. for
Defendant No. 3.

CORAM : S.U.KAMDAR, J.

DATE : 9th August, 2005.

ORAL JUDGMNT :

. This suit is filed in the admiralty jurisdiction of this Court by the plaintiff for the recovery of US Dollars 57,860.00 with further

interest at the rate of 18% per annum on the principal amount of US Dollars 50,000/- as per the particulars of claim which is annexed at Exhibit F to the plaint. The said particulars of claim indicates that a sum of US Dollars 45,065.00 is claimed towards the value of the goods in respect of Container No. 106397(O) and further claim for other charges of US Dollars 6,309.10 recoverable towards D.E.P.B. and interest for the period from 14.4.1998 to 27.12.1998.

2. Some of the material facts of the present case briefly enumerated are as under :-

3. In respect of the contract for export, the plaintiff was required to export the goods to one M/s. Asfeha Tewolde K/Yesus (East African Blanket Plant, Ethiopia) and for the said export the Commercial Bank of Ethiopia, Addis Ababa, Ethiopia established an irrevocable letter of credit in favour of the plaintiff. Under the said letter of credit, it was inter alia provided that the shipment which was required to be effected not later than 20.4.1998. The said shipment was to be effected from any Indian Port to Assab Port, being the port of destination. The plaintiff thereafter approached the 3rd defendant who was acting as an agent of the 2nd defendant and was booking the cargo on the 1st defendant ship of which the 4th defendant is the

owner. The plaintiff and the defendant no. 3 who was acting as an agent of the 2nd defendant who in turn was acting on behalf of the first and the fourth defendants for hire of the cargo on the said ship. Pursuant thereto, two containers bearing No. LMCU 106397 (O) and LMCU 106410 (7) were handed over to the plaintiffs for the purpose of stuffing. The plaintiff thereafter stuffed the goods i.e. 36 bales of yarn and binding ribbon in each container. Thus, the total goods in respect of the said two containers were around 72 bales of yarn and binding ribbon therein. M/s. Jupiter Shipping Agency was appointed as a clearing and forwarding agent who processed all the documents and other requirements as provided under the provisions of various statutes. A shipping bill was prepared for export of the said goods to the customs. After inspection the said goods were sealed by the Customs Authorities and the containers were handed over to the 3rd defendant for the purpose of shipping the same on the 1st defendant vessel on 7.4.1998. On receipt of the said container the 3rd defendant issued three mate receipts bearing no.2905, 2906 and 2907 all dated 1.4.1998. The plaintiff also obtained a duly certified shipping bill indicating the shipment of the said goods on the 1st defendant vessel. After obtaining the mate receipt the plaintiff prepared various documents such as invoice containing the said container numbers, packing list,

and other documents for the purpose of forwarding the same to the buyer to negotiate the same for clearing of the goods. One of the documents which was required for the purpose of taking delivery of the goods by the buyer at the port of destination was the bill of lading which was required to be issued by the 3rd defendant.

4. It is the case of the plaintiff that the plaintiff approached the 3rd defendant for release of the bill of lading covering the shipment of the two containers against the mate receipt. However, defendant no. 3 insisted on payment of the charges firstly of outstanding arrears and secondly in respect of the suit consignment. It is the case of the plaintiff that pursuant thereto, the plaintiff issued two bankers' cheques one for Rs. 4,53,560/- covering the outstanding dues which were due and payable by the plaintiff to the 3rd defendant and another bankers' cheque for Rs. 1,52,700/- being the freight payable in respect of the shipment of the suit consignment. After handing over the said two drafts as also the mate receipts which were issued by the 1st defendant vessel for the said two containers, the 3rd defendant was required to hand over the bill of lading evidencing the shipment of the goods by the said ship which were to be forwarded to the port of destination for the purpose of taking delivery of the said goods by the buyer.

The aforesaid fact the plaintiff recorded in their letter dated 13.4.1998 addressed to the 3rd defendant.

5. Further in the meantime, the vessel sailed to the port of destination. Thus, the goods which were loaded in the vessel were on the voyage to the port of destination. However, the 3rd defendant in spite of obtaining the necessary payments from the plaintiff both in respect of the outstanding arrears as well as in respect of the suit consignment, did not issue the bill of lading. He inter alia contended that there were some other outstanding due and payable by one Deepak Woollen Mills Ltd. With the result, the goods though landed at the port of destination delivery thereof could not be taken in the absence of the bill of lading. In spite of the repeated requests, the 3rd defendant did not issue the bill of lading and in the meantime the letter of credit lapsed and the value of the consignment has been lost. The plaintiff is neither able to recover the said goods nor the payment thereof. By a letter dated 24.7.1998 the plaintiff informed the defendant that the validity of the letter of credit has expired and whereabouts of the goods are also not known though the said goods were loaded on the 1st defendant vessel for discharge of the same to the port of destination. The plaintiff also called upon the defendant no. 3 that inspite of making payment

and complying with all obligations on their part, the defendant no. 3 had defaulted by not issuing the bill of lading as required as an obligation of the shipper and thus the plaintiff will be entitled to their claim as mentioned in the invoice. Another notice was also given on 11.8.1998. However, in reply thereto the 3rd defendant denied their liability by a letter dated 13.8.1998. Ultimately, a further advocate's notice was given on 24.9.1998 and the present suit is filed for recovery of the aforesaid amount.

6. It is the case of the plaintiff that under the provisions of Carriage of Goods by Sea Act the bill of lading being the document evidencing the title is required to be issued by defendants and an obligation is cast upon the carrier/ operator/ agent to issue the bill of lading or some other document certifying therein that the said goods are shipped on board and that they will deliver the same to the holder thereof on the presentation of the same to them. It is the further case of the plaintiff that the defendant cannot withhold the said bill of lading particularly when the entire charges for the carriage of the goods have been paid. In the aforesaid circumstances, the plaintiff claims in the present suit the aforesaid amount towards the goods lost by virtue of inaction on the part of the defendant no. 3 to issue the bill of lading. The

plaintiff has also sued the defendant no. 2 who is admittedly the principal of defendant no. 3 and thus liable in respect of the present goods. The plaintiff has also sued the defendant nos. 1 and 4 because according to the plaintiff, the defendant no. 1 is the vessel on which the said goods were shipped. The defendant no. 4 is the owner of the ship and under a chartered party agreement, he has chartered the vessel through third party who has in turn chartered the vessel to the 2nd defendant permitting the 2nd defendant through his agent the 3rd defendant to book the cargo on the ship. It is the case of the plaintiff thus that in respect of the said goods which is lost in the course of the aforesaid transaction, all the defendants are jointly and severally liable for making payment of the value of the goods and consequent interest for non-receipt of the said payment.

7. The defendant nos. 1 and 4 have filed their written statement inter alia denying their liability. In the written statement it is their case that they are not party to the transaction which is the subject matter of the suit. It has been contended that there is no privity of contract between the plaintiff and the defendant no. 4 who is the owner of the vessel. Consequently the defendant no. 1 being the asset of the 4th defendant cannot be sued for the recovery of the

said claim. It is further case of the defendant no. 1 and 4 that the vessel of the defendant no. 4 was wrongfully arrested and by virtue of such arrest the defendant nos. 1 and 4 were forced to give security for expeditious release of the 1st defendant vessel and, therefore, the suit of the plaintiff should be dismissed. It has been contended that unless the defendant no. 4 is liable the 1st defendant cannot be held liable because before a claim can be made in rem it must first lie in personam against the owner of the vessel. It is further contended that in so far as the defendant no. 1 and 4 are concerned, by virtue of taking the cargo from port of loading in India to the port of discharge at Assab Port, they have already discharged their obligation and thus they are not liable for any claim of the plaintiff herein. It is further contended that the liability to issue bill of lading is not that of the 1st and the 4th defendant but only of 2nd and 4th defendants and thus, there is no breach of any obligation on their part. It has been contended that it is no doubt true that the 2nd and 3rd defendants were liable to issue the bill of lading but they have not issued the same because there is a dispute and for which defendant nos. 1 and 4 cannot be held liable. In view of the aforesaid contention it has been contended that the suit is liable to be dismissed.

8. The defendant nos. 1 and 4 have thereafter

filed a supplemental written statement in which they have inter alia denied the valuation of the claim by the plaintiff in the present suit.

9. The second defendant who is the principal of the 3rd defendant has also filed a written statement. They have contended that in so far as the act on the part of the 1st defendant is concerned of not issuing the bill of lading, the 2nd defendant is not liable because the 3rd defendant has acted on their own and without any prior consent/permission/instructinos from the 2nd defendant in the matter of shipment of cargo. It has been further contended that the 2nd defendant is not liable for the so called act on the part of the 3rd defendant because it was not within the scope of agency and/or not done with any prior knowledge or consent or permission of the 2nd defendant. It has been contended that even if the act of the 3rd defendant is illegal, then the 3rd defendant alone is liable for such an act or omission and the 2nd defendant as a principal cannot be saddled with the said liability. In so far as the merits of the case is concerned, the 2nd defendant has supported the 3rd defendant by contending that it is unbelievable that the plaintiff would take the risk of suffering loss of US$ 57,860.00 for non-payment of small amount of Rs. 3,86,915/- which was demanded by the 3rd defendant and thus the present suit of the

plaintiff must be dismissed. The rest of the written statement of the 2nd defendant proceeds on the basis of denials. He has further contended that the plaintiff should have paid the said amount demanded by the 3rd defendant of Rs. 3,86,915/- at least under protest so as to save the cargo and the value of the goods which is otherwise lost.

10. The written statement of the 3rd defendant which is the priority responsible party in the present case by non-issuance of a bill of lading inter alia contends that the suit as against the 3rd defendant should be dismissed because they are acting on behalf of the disclosed principal i.e. the 2nd defendant. It has been further contended that the present suit is liable to be dismissed because of suppression of material facts. In the written statement the defendant has put up an oral agreement.

11. It is the case of the 3rd defendant that Mr. Deepak Goel, Mr. Pandey and Mrs. Lobo were entrusted on behalf of the plaintiff to look after the export of cargo on behalf of the plaintiff and the Group companies of the plaintiff. Deepak Woollens Ltd., was also, according to them, a group company of the plaintiff, The said Deepak Woollens Ltd., is under common management of Mr. Surendra Goel, Mr. Virendra Goel and Mr. Deepak Goel who

are the directors of both the companies and belong to the Goel family. It is their case that even for shipment of cargo Deepak Goel requested the 3rd defendant to provide to the plaintiff and Deepak Woollens Ltd., credit for payment of freight and other charges in respect of shipment of export cargo. Pursuant to the said arrangement, the credit facility was provided for a period of 12 to 20 days. Though the initial payments were made on time subsequently there were defaults on the part of the plaintiff as well as Deepak Woollens Ltd,. According to the plaintiff as on the February/March, 1998 i.e. just prior to the shipment, large amount was due and payable both by the plaintiff and said Deepak Woollens Ltd., It is their case that on 13.3.1998 when the plaintiff approached the defendant no. 3 for shipment of the goods under the two containers to Assab an understanding was arrived at that outstanding amount of the plaintiff as well as of the Deepak Woollens Limited would be paid along with charges for the suit consignment. According to defendant no. 3, the said arrangement was arrived at with Surendra Goel and under that arrangement the 3rd defendant accepted the consignment. Though the plaintiff paid the outstanding dues towards their own outstanding by a demand draft, the second demand draft for Rs. 1,52,770/- which was the exact freight of the ship consignment was in fact paid not towards the suit

consignment but towards the outstanding payable by Deepak Woollens Ltd., According to the defendant no. 3, therefore, there is no payment made of the freight charges of the suit consignment and also a part of the dues is still outstanding as due and payable by the plaintiff to the 3rd defendant towards the liability of Deepak Woollens Ltd., It is under these circumstances the plaintiff did not issue the bill of lading unless they receive the entire payment.

12. It is the case of the 3rd defendant that thus the 3rd defendant is not liable because they were not liable to issue the bill of lading under the oral arrangement till and until they received the entire outstanding dues of Deepak Woollens Ltd., also and, therefore, they are justified in withholding the said bill of lading. It is the case of the defendant no. 3 that consequently they have filed a summary suit being Summary Suit No. 2752 of 2002 against Deepak Woollens Ltd., in respect of the outstanding dues. It is, therefore, the case of the 1st defendant that in the aforesaid circumstances, the plaintiff has failed to get the bill of lading released and, therefore, it is a breach on the part of the plaintiff of such an oral arrangement and thus the defendant no. 3 be exonerated from any liability towards the suit claim.

13. On the aforesaid pleadings, the issues were framed which read as under :-

1. Whether the plaintiffs are entitled to receive a sum of US$ 57860 together with interest @ 18% p.a. as per the particulars of claim shown in Exhibit E to the plaint?

2. Whether the plaintiffs have become entitled to receive a sum of US$ 50,000 as damages?

3. Whether Defendant no. 1 and Defendant No. 4 prove that they are third parties to the suit transaction and that there exists no privity of contract between the plaintiffs and the Defendant no. 1 and defendant no. 4?

4. Whether the Defendant no. 1 and Defendant no. 4 prove that for the vessel to be proceeded against in rem, a claim must just lie against her owner in personam?

5. Whether the defendant no. 1 and Defendant no. 4 prove that the vessel was given on charter to Bengal Xpress Container Lines Ltd., who had entered into a further charter with Shreyas Shipping Ltd., who in turn had a connecting

carrier agreement with the 2nd Defendants?

6. Whether the plaintiffs prove that under the letter of credit, shipment was required to be effected on or before 20th April 1998?

7. Whether the Defendant no. 1 and Defendant no. 4 prove that by reason of the Mate receipt dated 1st April 1998 having been issued by the 3rd Defendants, the plaintiffs cause of action can only lie against the 3rd Defendants and/or the 2nd Defendants?

8. Whether the plaintiffs prove that it was the obligation of the Defendants to issue to the plaintiffs a Bill of Lading?

9. Whether the 2nd Defendants prove that the 3rd defendants acted on their own and without any prior consent, permission or instructions from 2nd Defendants in the matter of shipment of the cargo?

10. Whether the 2nd defendants prove that the plaintiffs were in arrears for payment of freight?

11. Whether the plaintiffs prove that the sum of Rs. 1,52,770/- was paid in respect of freight

for the suit consignment?

12. Whether the 2nd Defendants prove that the 3rd Defendants acted on their own accord and their acts/omissions were not binding upon the second defendants?

13. Whether the 2nd Defendants prove that the third Defendants on their own adopted ways and means for recovery of the arrears?

14. Whether this Hon'ble Court has jurisdiction to try the suit?

15. Whether the suit is barred by limitation?

16. Whether the plaintiff discloses any cause of action against the 3rd Defendants when admittedly the 3rd defendants were acting as agents of a disclosed principal>

17. Whether the plaintiff proves that the plaintiff paid the freight in respect of the suit consignment to the 3rd defendants?

18. Whether the plaintiff proves that the 3rd Defendants have contravened the provisions of the Carriage of Goods by Sea Act or the Bills of Lading Act as alleged in paragraph 9 of the

Plaint?

19. Whether the Plaintiff proves that the 3rd Defendants in any manner acted in collusion with Defendant nos. 1 and 2 or committed acts of malafide, malfeasance, non-feasance or tortious acts resulting in conversion of the suit consignments to their benefit and loss to the Plaintiff as alleged in paragraphs 9 and 11 of the plaint.

20. Whether the Plaintiff proves that the 3rd Defendants are in any manner liable to pay any amounts as claimed in the suit?

21. Whether the 3rd Defendants prove that the suit consignment were accepted and carried on the basis of the understanding set out in paragraphs 4 to 7 of the written statement?

22. Whether the 3rd Defendants prove that they were acting within authority as agents of the 2nd Defendants.

23. Whether the 3rd defendants prove their claim in the counter claim filed by the 3rd Defendants.

24. What orders?

25. What reliefs?

14. After the issues were framed, the matter was referred to the Commissioner for recording evidence. The said order appointing the Commissioner has been passed on 18.7.2002 by the learned Single Judge of this Court. The idea of appointment of the Commissioner was to expedite the hearing of the suit because once the evidence is recorded the matter can be heard expeditiously. However, the said Commissioner returned the papers as his term expired on 23.3.2003 without completing the said evidence. Thus, because of non-cooperation of the parties the Commissioner could not conclude the evidence. When the matter was placed before me on 9.6.2005, I once again extended the time directing the Commissioner to complete the evidence by 30.6.2005. Inspite of the extension granted though the plaintiff has concluded their evidence, the 3rd defendant did not make himself available for recording the evidence. With the result, the said time of 30.6.2005 also expired without recording any evidence whatsoever before the Commissioner. An application was made before me by the 3rd defendant for extension of time before the Commissioner which I declined and thereafter I myself recorded the evidence of the 3rd defendant after imposing cost against the 3rd defendant. The aforesaid features of the present case are not

isolated to this case but I find that in most of the suits where the Commissioner is appointed under Order 26 Rule 4 of the Code of Civil Procedure, which has been introduced with an intention to expedite the trials of the suits, the evidence is not progressing before the Commissioner for years together. Parties after obtaining the orders to record evidence before the Commissioner do not further act with the result one or two witnesses are also not examined even after the expiry of 2-3 years. In my opinion, this act on the part of the advocates results in further delaying the suit rather than expediting the same. Once the suit goes out of the purview of the Court by virtue of the appointment of Commissioner I also find that there is no monitoring by the Court in respect of the recording of the evidence on Commission. In most of the cases, extensions are granted as a matter of course with a view to see that parties do not get affected. Further, the parties taking advantage of such a justice oriented approach by the Court in fact does not diligently proceed with the matter and co-operate with the Commissioner in recording the evidence. The parties are saddled with all cost, charges and expenses of the Commissioner. Adjournments are frequently sought before the Commissioner on the ground of availability or non-availability of the witnesses and are mechanically granted apart from the fact that before the Commissioner objections of all sorts are raised

which ultimately lengthens the procedure. I am not at any point suggesting that the mechanism of recording evidence by the Commissioner should be dispensed with because it is now well known fact that burden on Courts has become so huge that to record evidence in respect of each of the suit is very difficult if not almost impossible. I am of the opinion that appropriate mechanism be innovated for monitoring the conduct of the Commissioner in recording the evidence. The Commissioner should be given power to close the evidence of a witness who deliberately does not make himself available before the Commissioner for recording his evidence either in examination-in-chief or cross-examination in spite of giving opportunities for the same. The Commissioner also should be directed that in an event if he finds that evidence is not progressing by virtue of the attitude of the parties to the litigation, then he should approach the Court for necessary directions and at that stage the Court should impose necessary conditions/directions and / or if necessary cost to the defaulting party so that the trial before the Commissioner can be expedited and not delayed. Merely providing for the provision for recording evidence before the Commissioner, in my opinion, is not enough but it also has to be made effective by providing necessary support to the Commissioner for expeditious conducting of the evidence. In the present case only three witnesses are examined in the

course of almost three years. The Commissioner has given his report indicating the non-cooperation of the parties in concluding the evidence. In the present case, therefore, I did not extend the time on the second occasion after my order dated 9.6.2005 and thereafter recorded the evidence myself of the witnesses of the third defendant after levying appropriate cost in the present case.

15. In the present case, the defendant no. 1 , 2 and 4 have not led any oral evidence. The plaintiff has examined two witnesses and the third defendant has examined one witness. The said witness of the plaintiff has been cross-examined by all the defendants. The witness which has been examined is one Mr. Surendra Goel. He has filed his examination-in-chief and in his examination-in-chief he has inter alia deposed that he received a contract from M/s. Asfeha Tewolde K/Yesus (East African Blanker Plant, Ethiopia) for export of nylon yarn bales. The plaintiff thereafter agreed to ship the said consignment of yard, valued at us $ 45,065 to Pot Assab. It was stated that the said order was received by the plaintiff firm and it is the plaintiff company who was to dispatch the said goods and an irrevocable letter of credit bearing No. 08/LC/65/98 dated 12.3.1998 was executed in favour of the plaintiff for half the value of the contract. It was provided therein that the balance value of the

contract was payable against delivery. It is his deposition that subsequent to obtaining the contract the plaintiff entered into an arrangement with Meridian Shipping Agency Pvt. Ld., who is the third defendant herein for transportation of the said cargo. It is his case that the 3rd defendant in fact provided two containers for stuffing the cargo and in the said two containers the plaintiff stuffed 72 bales of nylon yarn and 4 packages of nylon ribbon for the purpose of discharge of the goods. It is his case that in respect of the said export three shipping bills were prepared and were cleared by the Customs authorities at Bombay and consequently the said two containers were handed over to the defendant no. 3 for the purpose of transportation of the said goods and the 3rd defendant issued three mate receipts bearing No. 2905, 2906 and 2907 all dated 1.4.1998. According to the 3rd defendant the said mate receipts were required to be surrendered against the 3rd defendant issuing a bill of lading for transportation of the said goods. The plaintiff has deposed that the plaintiff was required to forward the documents for negotiation to the purchase of the said goods at Asfeha but the said documents could not be forwarded because of non-issuance of bill of lading. It is further deposed that the plaintiff attempted to procure the said bills of lading on the basis of the mate receipts from the 3rd defendant. However, the 3rd defendant did not issue the

necessary bill of lading for the purpose of forwarding the same to the purchaser to take delivery of the said goods. The plaintiff has deposed that defendant no. 3 was insisting on the payment of outstanding amount from the plaintiff along with the value of the present consignment before the said bill of lading can be released. He has further deposed that pursuant thereto, the plaintiff paid by two banker's cheques a sum of US Dollars 4,63,560/- towards the outstanding arrears and a sum of Rs. 1,52,770/- towards the freight charges for the suit consignment to the 3rd defendant and on receipt of the aforesaid two bankers' cheques on 13.4.1998 they were entitled to receive the said bill of lading. It is the further case of the plaintiff that the said goods sailed on 7.4.1998 but bill of lading was not issued even after making the payment of the freight charges. Secondly, the letter of credit which was issued lapsed and thus the said goods have been lost and could not be cleared and delivered to the purchaser of the said goods. The plaintiff has deposed that in the aforesaid circumstances the plaintiff issued a notice to the 3rd defendant dated 24.7.1998 and demanded the price of the goods which has been lost. The plaintiff has similarly issued a notice to the other defendants. The plaintiff received a letter on 31.7.1998 for the first time inter alia claiming that they have not paid freight charges of the consignment and that a sum of Rs.

1,52,770/- paid by the plaintiff to the defendant towards the suit consignment which is the exact freight charges payable by the plaintiff was in fact paid towards the dues of Deepak Woollen Ltd., and they have accordingly adjusted the said amount and thus by virtue of non-payment of the amount towards suit consignment they are justified in not issuing the bill of lading. The witness of the plaintiff has also produced the document to establish the value of the goods particularly in the form of invoices which are on record. The value of the goods has not been seriously disputed by any of the defendants in the present suit and thus, the particulars of claim which contains the value of the goods is proved by the plaintiff by the aforesaid evidence. The plaintiff has also filed a compilation of original documents which are taken on record by the Commissioner in the course of the evidence which are Exhibits P-1 to P-35. Thereafter the cross-examination was conducted of the said witness and in the cross-examination by the 2nd defendant it has been sought to be brought in that Deepak Woollens Ltd., and plaintiff company is a group company and there is shareholding of Goel family in both the companies. It has been further sought to be suggested in the cross-examination of the plaintiff that the claim raised is only against the 1st defendant and not against the 2nd and the 3rd defendant. Thereafter a detailed cross-examination is sought to be conducted on the so called claim of

the defendant no. 3 that the plaintiff was liable to make payment towards the dues of Deepak Woollen Ltd. However, in the cross-examination the witness of the plaintiff has straightfastly denied that there is any liability of the plaintiff in respect of outstanding of M/s. Deepak Woollens Ltd., The suggestion that there was an arrangement that unless the Deepak Woollens Limited's dues are paid the 3rd defendant will not issue the bill of lading to the plaintiff has been denied by the witness in his cross-examination. Thereafter the witness is being cross-examined by the 3rd defendant almost on the similar lines. On a purported contention that the 1st defendant owned, controlled and managed the plaintiff company and the said Deepak Woollens Limited and, therefore, they are all group companies. To the suggestion whether both the companies were dealing with the 3rd defendant the plaintiff has answered that it is true that they were dealing with the 3rd defendants but they were dealing in their respective contracts. However, an instance in 1993-94 was put to him in which there was dispute between Deepak Woollens Limited and the defendant no. 3 and which was referred to the deponent and that the said dispute was sorted out. The said dispute was referred because the defendant no. 3 was claiming that the liability of the plaintiff must be paid by Deepak Woollen Mills Ltd., This liability was however disputed by the plaintiffs. Ultimately he has

deposed that the issue was resolved by Deepak Woollens Limited by paying the amount as demanded by the defendant no. 3. From the aforesaid suggestion it has been sought to be stressed that there are inter se transactions between the parties. In the course of the cross-examination from defendant no. 3, the defendant no. 3 has produced the balance-sheet of both the plaintiff and Deepak Woollens Limited and the so called pattern of share holding.

16. Thereafter the defendant no. 3 led the evidence of one Anil Madhavan in which he has inter alia reiterated his case of so called arrangement and contention that because the Deepak Woollens Ltd., did not make payment as per the oral arrangement he has not issued the bill of lading. However, the cross-examination of the witness is quite significant. In his cross-examination particularly by the defendant nos. 1 and 2 he has deposed that he did not receive the amount towards the suit consignment and also earlier dues from the plaintiff herein and, therefore, he did not follow the procedure of issuing the bill of lading unless receipt of the payment of the freight charges. Thus, on overall evidence one fact is established that though the goods were shipped by the defendant no. 3 on the defendant no. 1 vessel, the defendant no. 3 though liable to issue the bill of lading has not

issued the same.

17. The learned counsel appearing for defendant no. 1 and defendant no. 4 has submitted that this Court has no jurisdiction to entertain and try the present suit. The learned counsel for defendant no. 1 and defendant no. 4 has contended that for the purpose of exercising admiralty jurisdiction by this Court it is necessary that as on the date of the institution of the suit the vessel i.e. defendant no. 1 herein must be within the territorial jurisdiction and/or territorial waters of this Court. It was submitted that if at the date of institution of the suit the vessel was not within the territorial jurisdiction of this Court then in that event the suit is without jurisdiction as on the date of institution thereof and, therefore, the suit must be dismissed. It has ben further contended that subsequent arrival of the vessel within the territorial jurisdiction of this Court and arrest thereof by the Court would not confer a jurisdiction on this Court which was lacking as on the date of institution of the suit. It was thus contended that in the present case when the suit was instituted i.e. on 6.3.1999 admittedly the vessel the defendant no. 1 was not within the territorial jurisdiction of this Court. The vessel arrived only sometime in or about April 1999 and, therefore, the suit when instituted was without jurisdiction and is liable to be

dismissed. It is further contended that an order passed on 19.4.1999 giving security from the Protection and Indemnity Club, The Steamship Mutual Underwriting Association (Bermuda) Limited, for the amounts stated in the Warrant of Arrest would not confer jurisdiction on this Court. It is contended that what is required to be seen is the date of the institution of the suit and whether on the said date this Court has any jurisdiction. It has been further submitted that the jurisdiction which was lacking on the date of institution of the suit will not come within the jurisdiction by subsequent arrest of the ship. The learned counsel appearing for the defendant no. 1 and 4 has drawn my attention to the judgement of the Apex Court in the case of M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd., reported in AIR 1993 SC 1014 particularly paragraph 56 thereof which reads as under :-

> "56. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within

> jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim."

It has been contended that the Apex Court has held that the ship must be within the jurisdiction of the Court at the time of the commencement of the proceedings means as on the date of institution of the suit the ship must be within the territorial jurisdiction of this Court for conferring the jurisdiction in that behalf. It has been further contended by the learned counsel that in Notice of Motion No. 3183 of 1998 in Admiralty Suit No. 57 of 1997 the learned Single Judge of this Court by an order dated 24.6.1999 has observed as under :-

> "2. The learned counsel for the plaintiffs fairly concedes that there is nothing on record to demonstrate that the 1st defendant vessel was within the territorial waters of this country on the date of the filing of the suit. Obviously, therefore, in the circumstances, this Court has no jurisdiction to entertain and try the suit against the 1st defendant."

It has been contended that on the basis of the aforesaid judgment of the Apex Court and the order passed by this court as set out hereinabove, it is clear that if the vessel was not within the territorial waters of India as on the date of the institution of the suit, the Court will not have jurisdiction to entertain and try the suit. It has been further contended that subsequent arrival of the vessel within the territorial waters of India and arrest thereof would not confer a jurisdiction on this Court. The second contention which has been advanced by the learned counsel is that there is no privity of contract between the defendant no. 4 who is the owner of the ship and the plaintiff. It has been contended that in absence of any privity of contract the defendant no. 4 has been wrongfully added as a party to the present suit and they are required to be removed from the arena of parties. It has been finally contended that in the absence of privity of contract between the parties the defendant nos. 1 and 4 cannot be held liable for the alleged claim of the plaintiff herein. It has also been contended in the alternative by the learned counsel for defendant nos. 1 and 4 that in any event the action of non-issuance of the bill of lading is that of defendant no. 3 and for such an inaction only the 3rd defendant is liable and not the defendant nos. 1 and 4. It has been further contended that the defendant no. 3 is not the agent of defendant nos.

1 and 4 so that vicarious liability can be imposed on defendant nos. 1 and 4. It has been further contended that in any event, the duty of the defendants nos. 1 and 4 was only to take the cargo from the Port of loading to the port of destination and discharge the same. It has been contended by the learned counsel that the obligation of the defendant nos. 1 and 4 has been duly complied with by them and, therefore, the defendant nos. 1 and 4 cannot be saddled with the liability in the present case.

18. The learned counsel for the plaintiff on the other hand has contended that the suit is maintainable and within the jurisdiction of this Court. It has been contended that on a proper reading of the judgment in M.V. Elizabeth and others (supra) it is clear that the Court would have jurisdiction to entertain and try the admiralty suit under the Admiralty Act, 1961 as amended from time to time upto the Supreme Court of Judicature (Consolidation) Act, 1925. It has been contended that the jurisdiction of the Admiralty Courts in India is equivalent to the jurisdiction of the Admiralty Courts in England. It has been contended that the Apex Court in the case of M.V. Elisabeth and others (supra) has held that there is no difference in admiralty jurisdiction between the jurisdiction of Indian Court and English Court and the power enjoyed by both the courts are identical.

It has been further contended that in view thereof what is required to be seen is what is the admiralty jurisdiction normally exercised by the English Courts. The learned counsel has contended that the English Courts exercise jurisdiction by institution of the suit even when the vessel is not within the territorial waters of India. But once the vessel enters within the territorial waters of India the same can be arrested and the jurisdiction can be acquired by virtue of execution of writ of arrest because the institution of the proceedings is interpreted as on the date when the writ is served on the ship i.e. the 1st defendant vessel and in the present case also writ is required to be served for the arrest of the said vessel. It has been contended that in the present case when the ship arrived within the territorial waters of India, this Court having exercised jurisdiction to arrest the same by serving writ on such a ship this Court has acquired the jurisdiction. It is not necessary, according to the learned counsel for the plaintiff that the ship must be in the territorial waters of India or within the territorial jurisdiction of the Courts of India as on the date of the lodging of the suit but it is sufficient even if when the writ of arrest is served if the ship is within the territorial waters of India it could acquire jurisdiction and entertain the present suit. The learned counsel has drawn my attention to the various judgements of the English

Court in support of the aforesaid contention. The said judgments are briefly referred to hereinunder:-

19. The learned counsel has cited the judgment in the case of THE ESPANOLETO reported in 1920 Probate Division page 223. He has drawn my attention to the following paragraph:-

> It is a motion by the defendants to set aside the writ and the renewal and the warrant of arrest and to discharge the undertaking to put in bail. The first ground of objection is that the arrest is invalid, because there was no valid writ in existence at the time of the arrest. If the writ is bad, there is, of course, nothing to support the warrant of arrest. A preliminary objection was taken on the hearing that the original writ was bad, because, it was said, a writ in rem cannot be issued unless at the time of issue the res is within the jurisdiction. No authority is given for that proposition, and I think the point is a bad one. Of course, a writ in rem cannot be served till the res comes within the jurisdiction, but I can see no reason why the writ cannot be issued and then served when the res comes within the jurisdiction."

Thereafter my attention is drawn to the case of The

Banco Owners of the motor vessel Monte Ulia v Owners of the ships Banco and others, reported in [1971] 1 All England Law Reports page 524, particularly the following paragraph.

> Per Lord Denning MR and Megaw LJ (Cairns LJ dissenting). Notwithstanding that a plaintiff is not entitled to arrest more than one ship belonging to a defendant, a plaintiff is entitled, as soon as a cause of action arises, to issue a writ in rem not only against the offending ship but against all the other ships which at that time are in the defendant's ownership because the Admiralty jurisdiction in rem cannot be said to have been properly invoked until the writ is served. A writ so issued must be amended by striking out the names of all the other ships (per Megaw LJ) before it is served on the ship which he chooses to arrest or (per Lord Denning MR) once the writ has been so served (see p 533 j to p 534 b and p 538 e to g, post).

Thereafter my attention was drawn to the judgment of the learned Single Judge in the very same matter reported in 1978 1 All E R 1065 where also the learned Judge has at length dwelt with the said issue in which it has been held as under:-

" The practice is based on convenience. When a plaintiff institutes proceedings, which he will often have to do by a certain date in order to preserve a time limit, he may well not know which of the various ships that he has an option to proceed against will be coming to a place within the jurisdiction so as to afford an opportunity for service and arrest, or when. By instituting proceedings concurrently in this way against all the ships concerned, he creates a situation in which, as soon as he learns that a suitable ship (by which I mean a ship whose value is sufficient to provide adequate security for the claim) is coming or has come to a place within the jurisdiction, he can immediately amend the writ by striking out all the other ships, and then serve the amended writ on, and at the same time take steps to arrest, or threaten to arrest, the particular ship concerned."

20. By relying upon the aforesaid judgments of the English Court, the learned counsel has contended that in fact the admiralty jurisdiction is exercised by the Court only when the writ or a warrant of arrest is served on the ship, till and until the same is done there is no institution of the proceedings in the eyes of the law. It has ben contended by the learned counsel relying upon the aforesaid judgements

that under the English Court procedure even a writ can be issued for arrest of the ship on more than one vessel and thereafter whichever vessel enters into the territorial waters of that country can be arrested in exercise of the said writ. Once a writ is exercised against a particular vessel then the writ in respect of other vessels becomes ineffective. It is, therefore, contended that under the admiralty law the institution of proceeding is not at the time of filing of the suit but only at the time when the court exercises jurisdiction by execution of warrant of arrest. It is, therefore, contended that the words "at the time of the institution of the proceedings" must be so read so as to construe that this Court will have jurisdiction even if at the time of filing of the suit the vessel was not within the territorial jurisdiction of this Court. The learned counsel has also drawn my attention to various paragraphs in the case of M.V. Elisabeth and others (supra) particularly paragraphs 41, 46, 47 and 48 of the judgment to contend that the Apex Court has in fact held that there is no reason to narrow down jurisdiction of the Indian Court but the same should be treated as wider as jurisdiction of the English Courts in the field of admiralty law. My attention is also drawn to paragraph 75 of the said judgment to show how the Court would exercise the jurisdiction in the case of the enforcement of maritime lien. My attention is also drawn to the order of the learned

Single Judge of this Court in Notice of Motion No. 3016 of 2000 in Admiralty Suit No. 25 of 1992 dated 8.12.2000 particularly paragraph 9 thereof in which the learned Single Judge has observed that there is no requirement that ship should be within territorial water of India as on the date of filing of the suit.

21. On consideration of the aforesaid judgments cited by the parties on the issue of jurisdiction, I am of the opinion that the two orders of the learned Single Judge of this Court which are brought to my attention are both the proceedings at the inter-locutory stage. Secondly, the issue is not considered in detail in as much as before the learned Single Judge in the order dated 24.6.1999 in Notice of Motion No. 3183 of 1998 the Court has recorded concession of the plaintiff and has held that the Court has no jurisdiction. In the order of another learned Single Judge which has been cited holding that the admiralty court would get jurisdiction even if the vessel is not within the territorial waters of this country is also based on mere observation at the inter-locutory stage without considering the merit in depth. In that view of the matter, while dealing with the matter at the final hearing stage, the views taken by both the learned Single Judges at the inter-locutory proceedings stage would not bind me as a binding precedent. It is well settled that views expressed at the interim stage are always mere prima

facie. It is also well settled that any decision taken on the basis of concession of the counsel also cannot be a binding precedent in law. In view of the fact that I am considering the matter at the final hearing of the suit and in view of settled law I require to decide the issue of jurisdiction on the basis of the arguments advanced by the learned counsel for the parties before me, I am of the opinion that the matter must be considered on the basis of the various authorities cited before me. I am of the opinion that in view of the judgement of M.V. Elisabeth (supra), the position in law is clear that the jurisdiction of this Court in its admiralty field is equivalent to the jurisdiction of the English Court. While interpreting the aforesaid judgment of the Apex Court in the case of M.V. Elisabeth (supra) I have considered the aforesaid proposition of law in Admiralty Suit No. 30 of 2002 Dallah Albaraka Investment Co. Ltd., vs. MT "SYMPHONY 1" ex. MT "ARABIAN LADY & Anr. decided on 18.7.2005 and I have held that the jurisdiction of this Court in its admiralty jurisdiction is equivalent to the jurisdiction of English Court exercising admiralty jurisdiction. I have further held that the provisions of all English Legislations as amended from time to time right to the stage of Brussels Convention are binding on this Court. The Apex Court in the case of M.V. Elisabeth (supra) has held that there is no reason why this Court should

narrow down the admiralty jurisdiction in this country when under the equivalent law the jurisdiction exercised by the English Court is much larger. In view of the judgment of the Apex Court in the case of M.V. Elisabeth (supra) and the view I have taken in the case of Dallah Albaraka Investment Co. Ltd., vs. MT "SYMPHONY 1" ex. MT "ARABIAN LADY & Anr. (supra), I am of the opinion that the jurisdiction must be determined in the light of the jurisdiction of the English Court while exercising admiralty jurisdiction. Thus, the observation of the Apex Court in paragraph 56 of the judgment would be required to be considered in the light of the law laid down in the said judgment of the Apex Court. It is well known that the decision is an authority on the proposition of what it decides and cannot be deduced or inferred therefrom. (See Haryana State Coop. Land development Bank vs. Neelam, reported in (2005) 5 SCC 91, Bharat Forge Co. Ltd., vs. Uttam Manohar Nakate (2005) 2 SCC 489 and Kalyan Chandra Sarkar vs. Rajesh Ranjan (2005) 2 SCC 42).

22. I have considered the judgments of the English Courts which are cited before me by the learned counsel for the plaintiff. The English Courts have made distinction between filing of the suit or even issuance of the writ by the Court with the execution or service of the writ on the ship. It is held by the English Courts that institution of the

proceedings in an admiralty jurisdiction is only when the writ is served upon the vessel by its arrest. Thus, keeping in mind the aforesaid distinction, it is required to be considered in the present case whether the observations of the Apex Court in para. 56 above would amount to institution of the proceedings at the date of filing of the suit in this Court or would be at the stage when the warrant of arrest has been executed. The learned counsel for defendant nos. 1 and 4 has contended that the question of issuance of a writ or execution thereof by way of arrest could not confer jurisdiction because under the provisions of the Civil Procedure Code in this country which is applicable to the admiralty jurisdiction the institution of the suit is on the date when the same is filed or is lodged in the Court. It has been further contended that in that view of the matter, this Court cannot take the view that the jurisdiction has to be determined as on the date on which the warrant of arrest was executed on the said vessel. Considering the aforesaid contentions and looking at the judgments of the English Court which are determining the issue at hand, I am of the opinion that in the present case also the date on which the warrant of arrest is executed would be the relevant date for the purpose of determination of the jurisdiction of this Court. There is no direct authority of the Indian Court considering the aforesaid issue. The observations

which are cited by the learned counsel in para. 56 of the Apex Court judgment is cited out of context. If the proposition of law pronounced by the Apex Court in the case of M.V. Elisabeth & ors. (supra) is taken into consideration then it holds that the admiralty jurisdiction of this Court is to be widened and should not be narrowed down. It has been held by the Apex Courts while overruling various judgments of the High Court that there is no reason why the jurisdiction of the admiralty courts in India must be narrower to that of the English Courts. The Apex Court has also held that the jurisdiction of the Indian Courts in admiralty jurisdiction is equivalent to the English Courts of admiralty jurisdiction because of the provisions of law which are being applicable to the Indian Courts right upto the Supreme Court of Judicature (Consolidation) Act, 1925 and the Convention of Bruseel is applicable to the Indian Courts because Indian Law of admiralty jurisdiction is governed by the said statute.

23. In light of the aforesaid view of the Apex Court I am required to consider whether the judgments of the English Courts which are cited before me should be accepted or not. I am of the opinion that normally the Court must strive in favour of holding of the jurisdiction in the courts. It is undoubtedly true that if the Court has no jurisdiction then it cannot confer the jurisdiction on itself but if on

the appropriate interpretation of the law as laid down by various authorities if the court can hold that this Court has jurisdiction then obviously the law is that the Court must strive to hold a jurisdiction rather than holding that the suit is liable to be dismissed for want of jurisdiction. In the present case, in light of the view expressed as a binding precedent of the Apex Court that this Court must widen the jurisdiction and consider the jurisdiction of the Indian Courts in admiralty field as equivalent to the jurisdiction of the English Court in that field, it is necessary that I must consider the judgements of the English Courts which have been cited before me. On a proper reading of the judgments of the English Courts, I am of the opinion that the Court has always made a distinction between the filing of a suit, issuance of a writ and execution thereof. The issue there arose slightly in a different context that is whether a party is entitled to obtain writs against more than one ship of the owner or only that ship which is within the territorial jurisdiction of the country can be sued and writ obtained against such ship only. However the courts held that it is not provided under the law that only one ship alone should be sued which is within territorial water of England. It has been held that practice prevailed of obtaining various writ and execute against a ship which enters territorial water of England is valid and reasonable

keeping in mind that to save limitation a suit may have to be instituted without any ship in the territorial water of England. Thus, a suit can be instituted within the period of limitation but at the same time no warrant of arrest can be executed unless the vessel comes within the territorial jurisdiction of the country. The Court can acquire jurisdiction if the writ or if the warrant of arrest is executed on the ship when it arrives within the territorial jurisdiction of this Court. The aforesaid view finds support from the aforesaid judgments of the English Court which are cited before me and I have quoted the same. In my opinion, the English view cited by the English judgments can be accepted particularly when there is no contrary judgement dealing with the issue directly of the Indian Courts, At least none such judgment has been brought to my notice except the aforesaid interim orders which are already been set out hereinabvoe.

24. The learned counsel for defendants nos. 1 and 4 has also contended that the decisions or the judgments of foreign courts do not have any binding value but merely is persuasive authority and Courts can derive no assistance from the decision that deal with the other law made in other country to deal with the situation that has arisen in India. He has relied upon the judgment of the Constitution Bench of the Apex Court in the case of Pratap Singh v. Shri

Krishna Gupta and others, reported in AIR 1956 S.C. 140. Thereafter he has relied upon the judgment of the Apex Court in the case of Forasol vs. Oil and Natural Gas Commission, reported in AIR 1984 SC 241 and has contended that English decisions have no binding but have persuasive value. The learned counsel has thus contended that I must not accept the judgment of English Courts cited by the plaintiff as the provisions of law are not similar. In view of the fact that I have held that the law governing jurisdiction of Indian Courts and English Court being similar, I do not accept the aforesaid contention of the Defendants Nos. 1 and 4.

25. On the other hand, the learned counsel for the plaintiff has alternatively urged that in any event on the ship arriving in India or on furnishing the security by the defendant no. 1 the defendant no. 1 has submitted to the jurisdiction of this Court. In support of the aforesaid contention, the learned counsel has relied upon the judgment of the Apex Court in the case of M.V. AL. Quamar vs. Tsavliris Salvage (International) Ltd., and others reported in AIR 2000 SC 2826, particularly para. 9 thereof. However, in the light of the view I have taken on the first issue, I do not propose to go into the alternative contention which has been advanced that this Court would acquire the jurisdiction even if the defendant has while giving security submitted to the

jurisdiction of this Court. In view of the aforesaid, I hold that this Court has jurisdiction to entertain and try the present suit.

26. The next contention which has been advanced by the learned counsel for the defendant nos. 1 and 4 is that there is no privity of contract between the plaintiff and the defendant nos. 1 and 4. On this aspect of the matter, the admitted facts are required to be considered i.e. The defendant no. 4 is the owner of the defendant no. 1 vessel. That the goods were loaded on the 1st defendant vessel for undertaking a voyage from Bombay to the port of destination Assab. That the defendant no. 4 as the owner of the vessel had entered into a charter party agreement with the third party who had entered into a further charter party agreement with the defendant no. 2. The defendant no. 2 was booking the cargo through defendant no. 3 who is his agent and pursuant to the said charter party agreement the defendant no. 3 has been empowered to book cargo on the 1st defendant ship. Thus, the question is that the goods which are lost and not delivered to the consignee at the port of destination could be a subject matter of a liability if the defendant no. 1 and 4 herein. On the other hand, the learned counsel for the plaintiffs has drawn my attention to the provisions of Rule 3 of Article III to the Schedule of the Carriage of Goods by Sea Act which reads as

under:-

"3. After receiving the gods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things --

(a) The leading marks necessary for indentification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

. Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number,

quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

It has been contended that the liability to issue the bill of lading is statutory on shipper, the master of the vessel and the agent. It has been further contended that ultimately the 3rd defendant was booking the cargo on the 1st defendant vessel on behalf of defendant no. 4 and that could be done only because of a charter party arrangement arrived at under which the job of booking the cargo on the vessel of the defendant no. 4 was transferred to the defendant no. 2 and through the defendant no. 2 to the defendant no. 3. It is therefore contended that the defendant no. 1 and 4 cannot escape the liabilities of the loss of the goods due to non-issuance of the bill of lading by the 3rd defendant.

27. The learned counsel for the defendant nos. 1 and 4 has drawn my attention to the judgment of the learned Single Judge of this Court in the case of Raj Shipping Agencies vs. m.v. "Bunga Mas Tiga" & Anr., reported in 2002 (1) ALL MR 145, particularly the following portion :

"In the present case, it is clear that there were two independent contracts in relation to purchase of oil. There was one contract between the owner of the Defendant No.1/vessel and M/s. North End Oil Pvt. Ltd., whereby the owner of the Defendant NO. 1/vessel agreed to purchase oil at the stated price from M/s. North End Oil Ltd., an the second contract was between M/s. North End Oil Pvt. Ltd,. and the Plaintiffs, whereby M/s. North End Oil Pvt. Ltd., agreed to purchase oil from the Plaintiffs at a stated price. The price of oil in both these contracts is different. In so far as, the purchase of oil by the owner of the Defendant No.1/vessel is concerned, there is no privity of contract between the Plaintiffs and the owner of the Defendant No. 1/vessel. Not only that but even a demand of the price was made by the Plaintiffs from M/s. North End Oil Pvt. Ltd. and the Plaintiffs have also lodged their claim with M/s. North End Oil Pvt. Ltd., the first Defendant has produced on record receipts which show that the owner of the first defendant vessel has already made payment of price of oil to M/s. North End Oil Pvt. Ltd. It is further to be seen here that in case the Plaintiffs claim against the Defendant No. 1/vessel and its owner is held

> to be maintainable, then the owner of the defendant No.1/vessel would be liable to pay price of the oil to two parties, namely M/s. North End Oil Pvt. Ltd., as also the Plaintiffs. Adopting such course of action would not amount to advancing justice. Supply of necessity would not make the owner of the vessel liable to pay the price of the supply, unless the Plaintiffs prove that the supplies were made at the instance of either the owner of the vessel or at the instance of the person authorised by the owner of the vessel."

Another judgement which has been brought to my attention is an unreported judgement in the case of Arcadia Shipping Pvt. Ltd,. vs. m.v. "AMER SHAKTI" decided by the learned Single Judge (D.K. Deshmukh, J.) on 27.6.2001 in Admiralty Suit No. 53 of 1988 and in which the learned Single Judge has held as under :-

> The 2nd Defendant has no relationship with the Plaintiffs. It is not even the case of the Plaintiffs that at any point of time the 2nd Defendant had asked the Plaintiffs to provide any service or supply to the vessel, thus there is no privity of contract between the Plaintiffs and the Defendants. The Defendants rely on a judgment of this Court in Notice of

Motion No. 81 of 2001 in Admiralty Suit No. 17 of 2000, Raj Shipping Agencies v/s. m.v. "Bunga Mas Tiga" and another dated 11th April, 2001."

In my view both the aforesaid judgments of the learned Single Judge has no application to the present case. That was the case where the plaintiff was supplying the services and necessities to the vessel. The contract to supply services and necessities was not with the vessel owner but with the third party. However, a maritime lien was claimed on the ground that merely because the necessities are supplied to the ship, the owner is liable. In the light of the aforesaid contention, the learned Judge has held that unless a party establishes that necessities were supplied at the instance of the owner of the vessel or any person authorised by the owner for the same, the claim as against the vessel would not be maintainable because there is no privity of relationship between the owner of the vessel and the person supplying the necessities and the remedy if any against is the 3rd party at whose instance the necessities are supplied. In the present case we are dealing with different situation. Here is the case where the goods are lost by virtue of non-issuacne of bill of lading. The business of the 1st defendant vessel is to transport the goods by sea and normally as a

matter of course the ship owner is entitled to book the said cargo on the ship. It is not disputed that the 2nd defendant is in law entitled to book the cargo on the 1st defendant vessel because of the charter party arrangement arrived at by him through a third party with the 4th defendant owner and in view thereof it is not possible to hold that there is no privity of contract with the plaintiff and the 4th defendant and thus the defendants nos. 1 and 4 are not liable to the said claim.

28. Thus, on both the aforesaid issues i.e. whether this Court has jurisdiction or nor and whether there is a privity of contract between the plaintiff and defendant no. 4 to stake the present claim, I hold that this Court has jurisdiction to entertain and try the present suit as well as that defendant nos. 1 and 4 is liable to the suit claim by virtue of maritime lien as the goods are lost by non-issuance of bill of lading by the 3rd defendant herein.

29. In so far as the merits of the claim is concerned, the learned counsel for the defendant nos. 1 and 4 has merely supported the claim of the defendants nos. 2 and 3 and thus they are not liable.

30. This leads me to the contentions raised by the

2nd defendant. The 2nd defendant is the principal of the 3rd defendant and 3rd defendant has though booked the cargo on the ship and loaded the goods on the ship but did not issue the bill of lading. The defence of the defendant no. 2 is two-fold. Firstly, it has been contended that the defendant no. 3 has rightly and justifiedly not issued the bill of lading because the plaintiff though there was an oral arrangement to make payment of the dues of Deepak Woollens Limited, failed to do so and thus the defendant no. 3 was not bound and liable to issue the bill of lading to the plaintiffs herein. This issue being common with the 3rd defendant I will deal with the same separately while dealing with the arguments of the 3rd defendant. However, so far as alternative issue is concerned, it has been contended that the 2nd defendant is not liable because the 3rd defendant has acted contrary to and beyond the authority conferred on him by the principal as an agent. The learned counsel for the 2nd defendant has relied upon section 188 of the The Indian Contract Act in support of the aforesaid contention. Said Section 188 of the Indian Contract Act reads as under :

> "188. Extent of agent’s authority.-- An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

> An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business." Quote

31. The defendant no. 3 has on the other hand contended that the defendant no. 2 being the principal and a disclosed principal under the Contract Act, the 3rd defendant is not liable but only the plaintiff is liable. It is an admitted position that the 2nd defendant is a foreign company and in case of a foreign principal the liability of the 2nd defendant does not get discharged merely by virtue of the fact that he is a disclosed principal.

32. It has been contended that non-issuance of the bill of lading by the 3rd defendant is an illegal act and for such an illegal and unlawful act of the 3rd defendant the defendant no. 2 being the principal is not liable. It has been further contended that the agency conferred on the 3rd defendant has to be agency in respect of the lawful acts and not in respect of an illegal act. I am not impressed with the aforesaid contention raised by the 2nd defendant. Issuance of a bill of lading is a normal act of the agent which he is required to do both in the normal course of transaction and under a

statute. The said 3rd defendant while issuing the bill of lading acts within the authority as conferred by the 2nd defendant. An omission of an act which is bound to do in the normal course of transaction would not make such an act illegal, unlawful or beyond the authority conferred on him. When an authority is conferred on an agent by the principal, the principal is aware that act on the part of the agent in carrying out the said authority has to be in the normal course of business and the principal would be liable for his acts and omissions. It is not permissible for a principal to contend that the normal act which is an agent liable to do in the course of discharge of his authority and if the agent omits to do such an act, that becomes an illegal act and the principal is discharged from the said liability. In the aforesaid view of the matter, I hold that the act on the part the defendant no. 3 not issuing the bill of lading is neither beyond the authority conferred on him by the 2nd defendant nor beyond contemplation of the 2nd defendant at the time of granting the agency.

33. Now this leads me to the next contention i.e. whether the defendant no. 3 was justified in non-issuance of the bill of lading. The argument which has been advanced by the 3rd defendant is that there was a tripartite arrangement between the

plaintiff, defendant and the Deepak Woollen Ltd. and an oral agreement was arrived at between the plaintiff and defendant no.3 that till and until the plaintiff makes payments of the arrears which are payable by him the amount of freight charges for the present suit consignment and the arrears of Deepak Woollens Limited, the defendant no. 3 will not issue the bill of lading. The aforesaid contention has to be examined at some length. It is because it is the aforesaid arrangement which is sought to be pleaded and proved by oral evidence and there is no writing in support of the aforesaid agreement or contention.

34. The learned counsel has contended that there was an oral agreement under which the plaintiff agreed for non-issuance of the bill of lading for the said consignment even if the entire payment is made of the arrears and freight charges towards the suit consignment as long as liability of the sister concern being Deepak Woollen Limited is not discharged. The learned counsel for the 3rd defendant has took me through the evidence of the defendants to establish the said contract of Mr. Anil Madhavan being paragraphs 2 to 5 and also has taken me through the documents Exhibits P-22 and P-28. He has also taken me through the cross-examination of the plaintiff particularly paras 14, 20, 31, 34, 45, 46 and 62 of the

cross-examination of the plaintiff to establish the so called oral arrangement. In support of this, he relied upon Exhibits P-22, P-28 and P-30 and contended that this correspondence and this portion of the evidence establishes his case of oral contract between the parties. On a plain reading of the evidence in cross-examination, I find that the plaintiff has not established any oral contract of the nature sought to be pleaded in the present case by the line of cross-examination which is conducted by them is sought to be established that the plaintiff and Deepak Woollen Ltd,. are the sister concern and one director is common in both the companies. It is further sought to be established that there is a cross holding of both the companies and thus both are sister concerns. It is sought to be suggested that the liabilities of plaintiff and the liabilities of Deepak Woollen Ltd., are inter-changeable. On the evidence, I find that the plaintiffs witness has though admitted that there is a cross holding and there is a common directors, he has straightaway refused that both are sister concerns. In fact the aforesaid contention does not advance the case of the defendant no. 3 because firstly admittedly both are corporate entities separate in its existence. The provisions of the Companies Act deals with the Corporate legal entity independently and merely because of the common directors and cross holding of some of the

shareholders liabilities of each of the said companies are not interchangeable or transferable unless there is a specific resolution passed by the concerned Board of Directors and/or there is an arrangement or agreement inter alia arrived at duly approved by the Board of Directors of the companies. Apart therefrom, I find that the evidence of the plaintiff is truthful. He has though admitted that there is a cross-holding and the common directorship, he has also admitted that similar situation was created by the defendant no. 3 in 1993 in which the defendant no. 3 after taking cargo in the ship of the said Deepak Woollen Ltd., insisted on the payment of dues of the plaintiff which according to the plaintiff was not due and payable. However, he has straightfastly refused any suggestion that there was any oral arrangement in this case to pay the liability of Deepak Woollens Ltd,. He has deposed that not only he was made to pay the entire arrears in the present case of his past dues but exact amount payable in respect of the consignment as communicated by the defendant no. 3 himself has been paid. A false plea has been raised by the defendant no. 3 that the exact amount payable towards freight of the suit consignment was in fact paid against the dues of the Deepak Woollens Limited. The learned counsel for the 3rd defendant admitted that in his letters dated 1.4.1998 Exhibit P-16 and another fax letter dated 8.4.1998 Exhibit

P-17 he has called upon the plaintiff only to pay his arrears and the freight charges for the suit consignment of Rs. 1,52,770/-. This amount has been admittedly paid by the plaintiff. But the learned counsel for the plaintiff has purportedly sought to rely upon Exhibit D-2 being a fax dated 1.4.1998 addressed by the defendant no. 3 to Deepak Woollens Ltd., under which they have claimed the amount of outstanding freight charges as Rs. 6,39,725/-. It is an admitted position that no such letter or fax or copy thereof was even furnished to the plaintiff herein. However, the learned counsel for the 3rd defendant contends that by virtue of the forwarding the said fax to the said Deepak Woollens Ltd., the plaintiff has also claimed the amount of arrears due and payable by Deepak Woollens Ltd., from the plaintiffs and that the plaintiff agreed to the aforesaid payment. When it was pointed out to the learned counsel for defendant no. 3 that there is no such oral contract or agreement has been established on the evidence, the learned counsel has contended that the agreement has been established by virtue of secondary evidence and the circumstantial evidence which are enumerated by the learned counsel for the defendant no. 3 as under :-

(i) That the plaintiff did not make demand for issuance of bill of lading till 23.6.1998.

(ii) That the original L.C. was valid for a short period but it was extended for a period upto 5.8.1998.

(iii) That in 1993 in respect of one of the transaction Deepak Woollen Ltd., paid the dues of the plaintiff. Similarly the plaintiff refused to issue bill of lading to the said Deepak Woollen Mills Ltd. and it is in spite of the same that the said both the plaintiff and the Deepak Woollen Mills Ltd., continued to conduct the business with defendant no. 3 meaning thereby that they have accepted the liability to make payment of each others dues and shipment charges.

(iv) He has contended that the oral evidence of cross holdings and common directorship establishes that both the companies are same under one group and are liable to make payment of each others dues.

(v) that on 1.4.1998, two letters were addressed by the defendant no. 3 demanding the arrears, one to the plaintiff demanding their arrears and one to Deepak Woollens Ltd., demanding their arrears and that indicates that both the companies were put on notice that the plaintiff is claiming the said arrears and till

such amount is received the bill of lading not to be issued.

It is his contention that cumulative effect of all the aforesaid inundating circumstances indicates that the defendant no. 3 and the plaintiff entered into oral arrangement agreeing to make payment of the arrears of Deepak Woollens Ltd., and till and until such arrears are not paid, the defendant no. 3 will not issue the bill of lading in respect of the goods to the plaintiff. It is his case that it is an admitted position that the plaintiff did not make the payment of the said arrears of Deepak Woollens Limited and, therefore, the plaintiff has committed breach of the said oral arrangement/ agreement and, therefore, the defendant no. 3 is not liable for the loss of the goods by virtue of non-issuance of the bill of lading to the plaintiff by the defendant no. 3. Apart from the fact that no such oral agreement is established on evidence, I find that the case of the 3rd defendant is bogus and dishonest. It is not his case that on 1.4.1998 even the demand which he made on Deepak Woollen Ltd., was served upon the plaintiff. It is not established on evidence that on a particular day and time at particular place and by a particular person such a oral contract was arrived at. The defendant no. 3 has not only put one witness into the witness box, but defendant no. 3's witness on his

cross-examination has admitted that if he would have received the amount due and payable in respect of the plaintiff's arrears and suit consignment he would have issued the bill of lading. In his cross-examination he has not stated that the bill of lading would not be issued till and until the amount is paid by the said Deepak Woollen Mills Ltd., I am also not impressed by the oral arrangement put forth by the defendant no. 3 in the present case because the act on the part of the defendant no. 3 is totally dishonest and bogus. That on 1.4.1998 he demanded the arrears from the plaintiff. Admittedly the arrears are paid. Thereafter on 8.4.1998 by second fax being Exhibit P-18 he has only demanded the payment in respect of the suit consignment only and he did not demand from the plaintiff at any point of time the arrears payable by Deepak Woollens Ltd.,. Admittedly the said payment in respect of the suit freight charges in respect of the suit consignment has also been made by the plaintiff to the defendant no. 3. In view thereof, the entire liability of the plaintiff stood discharged. Unless and until it has been established by evidence as recognised in law that the plaintiff has taken over the liability of the said Deepak Woollens Limited it is not possible for me to hold that by such a circumstantial evidence liability is taken over. In my opinion, taking over of liability must be express and in any event by a sufficient evidence ought to

be established. In the present case the 3rd defendant miserably failed to establish such taking over of liability of Deepak Woollen Mills Ltd., by the Plaintiff. In the absence of any such evidence, it is not possible to hold in favour of the defendant no. 3 that the defendant no. 3 is not liable for non-issuance of the bill of lading by virtue of the breach allegedly committed by the plaintiff by non-payment of the dues of Deepak Woollens Ltd., Apart from the fact, I find that the case of the defendant no. 3 is also dishonest because the defendant no. 3 after taking over the delivery of the goods and putting on the ship and voyage having wrongfully pressurised the plaintiff to make not only the payment of the dues payable by the plaintiff but the so called claim of the Deepak Woollens Mills Ltd. also. Consequently the plaintiff has lost the goods by non-issuance of the bill of lading by the defendant no. 3. The act on the part of the defendant no. 3 not only being illegal and contrary to the provisions of Schedule I rule 3 of the Carriage of Goods Act but it clearly fastens the liability on the defendant no. 3 in respect of the suit claim for the loss of the goods and, therefore, in my opinion the defendant no. 3 is liable to make payment. However,the learned counsel appearing for the defendant no. 3 has contended that even if there is any liability, is the liability of the 2nd defendant and not of the

3rd defendant because he was acting merely as an agent of the 2nd defendant. The learned counsel has further contended by relying upon the judgment of the Privy Council in the case of Canada and Dominion Sugar Company Limited and Canddian National (West Indies) Steamships, Limited reported in 1947 Privy Council page 46 that in the present case there is no liability of the 3rd defendant to issue the bill of lading because the plaintiff has not demanded for the same. This contention is required to be rejected because the evidence in the present case indicate that the plaintiff has by a letter dated 23.6.1998 Exhibit P-22 and in para. 1 thereof have expressly stated as under:-

> "we have been regularly following up with you to issue us the B/L and you are withholding the same for no valid reasons.".

35. There is no cross-examination whatsoever in respect of the aforesaid statement contained in the said letter dated 23.6.1998. The said evidence forms part of the record. In view thereof, it is not possible to hold that the plaintiff did not demand the bill of lading and, therefore, the defendant no. 3 was absolved from the liability of issuing one.

36. In the present case, I find on overall assessment of the evidence on record and the documentary evidence produced before me that there is a bogus case put up by the 3rd defendant of an oral contract of taking over of liability and that till and until the said liability is discharged, the plaintiff will not be entitled to obtain a bill of lading for the goods put on transport by sea being the suit consignment. This issue has also been raised by the defendant no. 1 and 4 and defendant no. 2 while contesting the matter on merits and have supported the arguments of the 3rd defendant. In view of my finding by analysing the evidence on record that there is no oral contract between the plaintiff and the defendant no. 3 I must consequently reject the arguments of defendant nos. 1 and 4 and defendant no. 2 also in same respect.

37. In the aforesaid circumstances, I pass the following order.

> That the suit is decreed in terms of prayer clauses (a-i) and (c). In so far as prayer clauses (d), (e) and (f) are concerned, in view of the interim orders passed on 19.4.1999, of furnishing the security, the same does not survive any more. However, I further hold that the plaintiff is entitled to recover all the aforesaid claims as

decreed by me by enforcing the security furnished pursuant to the interim order dated 19.4.1999 to the Prothonotary and Senior Master, High Court, Bombay. In so far as cost is concerned, I find that the case of the defendant no. 3 being thoroughly frivolous, it is in the fitness of things that the defendant no. 3 be saddled with cost of the present proceedings. I accordingly award cost in favour of the plaintiff and against the 3rd defendant in the sum of Rs. 25,000/- only.

38. At the request of the learned counsel for the defendants decree is stayed for a period of four weeks from today.